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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 DAVID J. LEE, an individual and, on behalf
of others similarly situated,

14 Plaintiff,

15 v.

16 CAPITAL ONE BANK and CAPITAL
17 ONE SERVICES, INC., Virginia
18 corporations, DOES 1 through 100,
inclusive,

19 Defendants.

Case No. C07-4599 MHP

CLASS ACTION

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT AND FED.
R. CIV. P. 26(F) DISCOVERY PLAN**

Hon. Judge Marilyn Hall Patel
Complaint filed: Sept. 5, 2007

1 The parties, individual and proposed class representative Plaintiff David J. Lee and the
2 Defendants Capital One Bank and Capital One Services, Inc. hereby jointly submit this Case
3 Management Conference Statement for the Case Management Conference to be conducted in this
4 matter on December 10, 2007 at 4:00 p.m.

5 **I. JURISDICTION AND SERVICE:**

6 All parties have been served.

7 Plaintiff contends that the basis for the Court's subject matter jurisdiction is diversity of
8 citizenship and federal question jurisdiction. Defendants contend that plaintiff lacks Article III
9 standing to maintain this action and that the Court therefore lacks subject matter jurisdiction.

10 **II. STATEMENT OF FACTS:**

11 **A. Plaintiff's Statement**

12 1. Plaintiff David Lee obtained and received a Capital One No Hassle Miles Ultra –
13 For Professionals Card from Defendants in March 2007.

14 2. At the time he made application for that credit card he was advised that he and
15 Capital One were each entitled to mandatory arbitration of claims arising under and involving that
16 credit card.

17 3. Plaintiff David Lee, following his receipt of his Capital One credit card paid
18 Defendants the annual fee for that card: \$39.00. At the time he paid the annual fee for his
19 Capital One credit card Plaintiff David Lee paid for the right to demand mandatory arbitration of
20 any claim he had against Capital One for any goods or services he received from the use of his
21 credit card.

22 4. At the time Plaintiff David Lee physically received his Capital one credit card he
23 also received a customer agreement from Capital One.

24 5. The customer agreement provided, in part, that

25 “We [Capital One] may add to, remove, amend, or change any part or
26 provision of this Agreement including the annual percentage rate(s) on any
27 charges (including adding new provisions of the same or a different nature
as the existing provisions in this Agreement) at any time. “

28 “You waive the right to receive notice of any waiver or delay or
presentment, demand, protest or dishonor and any right you may have to

1 require us to proceed against another party before proceeding against you.
 2 You also waive, to the extent permitted by applicable law, any statute of
 3 limitations defense for an additional period of time equal to the applicable
 4 limitations period.”

5 “This Agreement is to be construed in accordance with and governed by
 6 the laws of the United States of American and by the internal laws of the
 7 Commonwealth of Virginia without giving effect to any choice of law rule
 8 that would cause the application of the laws of any jurisdiction other than
 9 the laws of the United States of America or the internal laws of the
 10 Commonwealth of Virginia to the rights and duties of the parties. ... If a
 11 court decides not to enforce a part of this Agreement, this Agreement will
 12 then read as if the unenforceable or invalid part were not there, but the
 13 remaining parts will remain in effect.”

14 6. The customer agreement also contained an arbitration agreement that stated, in part:

15 “IF YOU OR WE ELECT ARBITRATION OF A CLAIM, NEITHER YOU NOR
 16 WE WILL HAVE THE RIGHT TO PURSUE THAT CLAIM IN COURT OR
 17 BEFORE A JUDGE OR JURY OR TO PARTICIPATE IN A CLASS ACTION
 18 OR ANY OTHER COLLECTIVE ORRPERESENTATIVE PROCEEDING.
 19 EXCEPT AS SET FORTH BELOW, THE ARBITRATOR’S DECISION WILL
 20 BE FINAL AND BINDING. OTHER RIGHTS THAT YOU WOULD HAVE IF
 21 YOU WENT TO COURT, INCLUDING THE RIGHT TO CONDUCT
 22 DISOCERY OR TO APPEAL, MAY BE LIMITED OR UNABIALABLE IN
 23 ARBITRATION. THE FEES ASSOCIATED WITH ARBITRATION MAY BE
 24 HIGHER THAN THE FEES ASSOCIATED WITH COURT PROCEEDINGS.

25 ‘Claim’ means any claim or controversy or dispute of any kind or nature between
 26 you and us.

27 A. This definition includes, without limitation, any Claim that in any way
 28 arises from or relates to

- the Agreement and any of its terms (including any prior agreements between you and us or between you and any other entity from which we acquired your account)
- this Arbitration Provision (including whether any Claim is subject to arbitration) ...

B. This definition also includes, without limitation, any Claim

- ... based on any theory or relief or damages (including money damages and any form of specific performance or injunctive, declaratory or other equitable relief)
- based on any theory of law or equity (involving contract, tort, fraud, constitution, statute, regulation, ordinance or wrongful acts or omissions of any type, whether negligent, reckless or intentional)
- made by you or by anyone connected with you ...

- for which we may be directly or indirectly liable under any theory, including respondeat superior or agency (even if we are not properly named at the time the Claim is made)
- now in existence or that may arise in the future, regardless of when facts and circumstances that give rise to the Claim occurred or when the Claim accrued
- made as part of a class action, private attorney general action, or other representative or collective action which claim shall proceed on an individual basis as set forth more fully in this Arbitration Provision.

Arbitration Administrators. One of the following arbitration administrators (“Administrator” or, collectively, “Administrators”) will administer the arbitration: JAMS ... American Arbitration Ass’n ... National Arbitration Forum.

Procedures and Law Applicable in Arbitration. This Arbitration Provision is made pursuant to a transaction involving interstate commerce and shall be governed by and enforceable under the Federal Arbitration Act (the “FAA”). Questions about whether any Claim is subject to arbitration shall be resolved by interpreting this Arbitration Provision in the broadest way it may be enforced, consistent with the FAA and the terms of this Arbitration Provision. The arbitrator will apply substantive law consistent with the FAA and applicable statutes of limitations, but the validity and enforcement of any class action waiver is a question for a court of competent jurisdiction, not an arbitrator, to decide. ... The rules and procedures of the Administrator, which you may obtain from the Administrator, shall govern the arbitration unless they conflict with this Arbitration Provision, in which case this Arbitration Provision will apply. ...

No Consolidation or Joinder of Parties. The arbitration of any Claim must proceed in an individual basis, even if the Claim has been asserted in a court as a class action, private attorney general action or other representative or collective action. Unless all parties consent, neither you nor we may join, consolidate or otherwise bring Claims related to two or more accounts, individuals or accountholders in the same arbitration. Also, unless all parties consent, neither you nor we may pursue a class action, private attorney general action or other representative or collective action in arbitration, nor may you or we pursue such actions in Court if any party has elected arbitration. You will not have the right to act as a class representative or participate as a member of a class of claimants with respect to any Claim as to which arbitration has been elected.

Miscellaneous, Waiver, Severability, Survival. If you or we do not elect arbitration or otherwise enforce this Arbitration Provision in connection with any particular Claim, you or we will not waive any rights to require arbitration in connection with that or any other Claim. This Arbitration Provision shall survive: (i) suspension, termination, revocation, closure or change of this Agreement, your account and you relationship with us; (ii) the bankruptcy or insolvency of any party; and (iii) any transfer of your account, or any amounts owed to your account to any person or entity. If any portion of this Arbitration Provision is deemed invalid or unenforceable, the remaining portions of this Arbitration

Provision shall nevertheless remain valid and in force. In the event of a conflict or inconsistency between this Arbitration Provision and the other provisions of this Agreement or any prior agreement, this Arbitration Provision shall govern.”

B. Defendants’ Statement:

Plaintiff holds a credit card issued by Capital One Bank. The agreement governing the parties’ agreement contains a provision permitting either party to elect to resolve disputes through individual arbitration. Plaintiff does not have, and does not appear ever to have had, any kind of dispute with Capital One Bank, but makes a “facial” challenge to the mere presence of the arbitration provision.

Capital One Services, Inc. does not issue credit cards or set the policies at issue in the complaint. The agreements at issue are with Capital One Bank, not Capital One Services, Inc. Capital One Services, Inc. is thus not a proper party to this suit.

III. LEGAL ISSUES:

A. Plaintiff’s Statement:

1. Whether the arbitration agreement is unconscionable, unenforceable, and illegal pursuant to California law as well as precedents of the Ninth Circuit Court of Appeal.

2. Whether the arbitration agreement is unconscionable pursuant to Cal. Civil Code § 1670.5.

3. Whether the arbitration agreement’s term concerning payment for an arbitration violates Cal. Code of Civil Procedure § 1281.4.

4. Whether the arbitration agreement, due to its unconscionability and violation of Civ. Code § 1670.5 violates California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 et seq.

5. Whether the arbitration agreement, due to its violation of Code of Civ. Proc. § 1281.4 violates the UCL.

6. Whether the arbitration agreement is unfair and thereby violates the UCL.

7. Whether the arbitration provision violates California’s Consumer Legal Remedies Act (“CLRA”), Cal. Civil Code §§ 1750 et seq., and particularly § 1770(a)(19) which makes it an

1 unlawful act to insert an unconscionable term in a contract.

2 8. Whether the arbitration provision, due to its violation of Civ. Code § 1770(a)(19),
3 violates the UCL.

4 9. Whether the customer agreement is unconscionable, unenforceable, and illegal
5 pursuant to California law as well as precedents of the Ninth Circuit Court of Appeal.

6 10. Whether the customer agreement is unconscionable pursuant to Cal. Civil Code
7 § 1670.5.

8 11. Whether the customer agreement, due to its unconscionability and violation of Civ.
9 Code § 1670.5 violates California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code
10 §§ 17200 et seq.

11 12. Whether the customer agreement is unfair and thereby violates the UCL.

12 13. Whether the customer agreement violates California’s Consumer Legal Remedies
13 Act (“CLRA”), Cal. Civil Code §§ 1750 et seq., and particularly § 1770(a)(19) which makes it an
14 unlawful act to insert an unconscionable term in a contract.

15 14. Whether the customer agreement, due to its violation of Civ. Code § 1770(a)(19),
16 violates the UCL.

17 15. Whether Defendants committed fraud against Defendant by making
18 misrepresentations to Plaintiff and similarly situated persons that the terms contained in the
19 Capital One card customer agreement and the customer agreement itself were conscionable, legal,
20 and enforceable, and that the controlling law pertaining to those cards was Delaware law, which
21 representations were relied upon by Plaintiff and, as a result, he paid the annual fee for the card.

22 **B. Defendants’ Statement:**

23 1. Whether plaintiff has Article III standing to maintain this action.

24 2. Whether plaintiff has stated a claim under the CLRA.

25 3. Whether plaintiff has stated a claim under the UCL.

26 4. Whether plaintiff has satisfied the pleading requirements under Rule 9 to state a
27 claim for common law fraud and deceit.

1 5. Whether plaintiff can assert a declaratory relief action given his failure to allege an
2 actual case or controversy.

3 6. Whether plaintiff can state a claim against Capital One Services, Inc. where the
4 agreements at issue relate to Capital One Bank.

5 **IV. MOTIONS:**

6 Plaintiff intends to file Motions regarding: class certification, summary judgment or
7 partial summary judgment, motions to compel discovery (responses to pending discovery), and
8 motion for leave to file additional interrogatories. Plaintiffs will oppose all motions listed below
9 by Defendants. Subject to the Court's permission, Plaintiff will file a motion for class
10 certification and partial summary judgment concurrent with the Defendants' filing of their motion
11 to dismiss since all such matters involve only questions of law.

12 Defendants intend to file a motion to dismiss for lack of subject matter jurisdiction and for
13 failure to state a claim under Fed. R. Civ. Proc. Rule 12(b)(1) and 12(c). Defendants anticipate
14 filing this motion the court day of the case management conference (December 10, 2007). If
15 defendants' motion to dismiss is unsuccessful, defendants anticipate that they will file discovery
16 motions and a motion for summary judgment. Defendants oppose Plaintiff's proposal to file a
17 motion for class certification concurrent with defendants' motion to dismiss because it would be
18 premature to raise class certification issues before, among other things, defendants have had any
19 opportunity to engage in discovery concerning the ability of the named plaintiff to serve as the
20 class representative.

21 **V. AMENDMENT OF PLEADINGS:**

22 The parties do not anticipate any amendments of pleadings at this time.

23 **VI. EVIDENCE PRESERVATION:**

24 Plaintiff will preserve all documents, in paper or electronic form, related to the subject
25 matter of this case (all such documents are currently exhibits to the Complaint, in any event).

26 Defendants have directed their relevant employees to preserve all documents, in paper or
27 electronic form, related to the subject matter of this case. Defendants will also preserve any e-
28 mails containing key words associated with issues in this case.

1 **VII. DISCLOSURES:**

2 **A. Plaintiff's Statement:**

3 All disclosures are made in the Complaint, including the identity of all documents and
4 factual matters.

5 **B. Defendants' Statement:**

6 Pursuant to Federal Rules of Civil Procedure 26(a)(1), defendants objected during the
7 parties' conference to making initial disclosures at this time. Defendants believe that initial
8 disclosures are premature and inefficient until such time as plaintiff's complaint survives a
9 motion to dismiss.

10 **VIII. DISCOVERY:**

11 Plaintiff's Discovery: Plaintiffs served the following discovery on November 16, 2007:
12 First Set of Interrogatories to Defendant Capital One Services, Inc.; First Set of Interrogatories to
13 Defendant Capital One Bank; First Set of Requests for Admission to Defendant Capital One
14 Services, Inc.; First Set of Requests for Admission to Defendant Capital One Bank; First Request
15 for Production of Documents to Defendant Capital One Services, Inc.; and First Request for
16 Production of Documents to Defendant Capital One Bank. Plaintiffs do not agree to any
17 limitations or modifications of the discovery rules set forth in the Federal Rules of Civil
18 Procedure and will oppose any effort by Defendant concerning bifurcation or delays in discovery.

19 Defendants' Discovery: Defendants have not yet taken any discovery. Defendants
20 anticipate taking discovery concerning the ability of the named plaintiff to serve as the class
21 representative, the alleged injuries suffered by the named plaintiff, and named plaintiff's
22 communications with defendants. Defendants do not agree to any limitations or modifications of
23 the discovery rules set forth in the Federal Rules of Civil Procedure. Defendants propose that
24 discovery be phased as described in defendants' proposed case schedule, below. Further,
25 defendants request that discovery be stayed pending resolution of defendants' motion to dismiss
26 for lack of subject matter jurisdiction.

27 **IX. CLASS ACTIONS:**

28 Plaintiff and Defendants propose that a hearing on class certification be held on or before

1 May 29, 2008.

2 **X. RELATED CASES:**

3 Plaintiff David Lee has filed similar actions in this Court: *Lee v. Chase Manhattan Bank*
4 *USA, N.A.*, Case No. C-07 4732 MJJ (filed September 14, 2007) and *Lee v. American Express*
5 *Travel Related Services, Inc.*, Case No. C-07 4765 EDL (filed September 17, 2007). However,
6 these cases were deemed “not related” by the Court.

7 **XI. RELIEF:**

8 **A. Plaintiff’s Statement:**

9 The UCL causes of action do not seek damages since none are statutorily authorized. The
10 only damages sought under the CLRA and fraud causes of action are punitive damages which, at
11 present, are not now calculable or otherwise ascertainable.

12 **B. Defendants’ Statement:**

13 Plaintiff is not entitled to damages relating to its CLRA or UCL claims. If liability is
14 found on the deceit claim, damages should be limited to those actually suffered by persons who
15 can demonstrate that they relied upon alleged representations of defendants. To prevail on the
16 deceit claim, plaintiff must prove reliance and actual harm.

17 **XII. SETTLEMENT AND ADR:**

18 The parties believe that settlement/ADR discussions are premature at this stage of the
19 litigation. They will conduct an ADR teleconference as required by the Local Rules.

20 **XIII. CONSENT TO MAGISTRATE:**

21 The parties do not consent to have a magistrate judge conduct all further proceedings.

22 **XIV. OTHER REFERENCES:**

23 None.

24 **XV. NARROWING OF ISSUES:**

25 The parties anticipate that resolution of anticipated motions may narrow the issues for
26 determination.

27 **XVI. EXPEDITED SCHEDULE:**

28 The parties do not believe that an expedited schedule is necessary.

XVII. SCHEDULING:

A. Plaintiff's Proposal:

Plaintiff believes that discovery should go forward in the presence of any pending motion and that bifurcation is not needed in that the issues involved in this action are almost exclusively questions of law (now that Defendants have finally admitted that Plaintiff holds a Capital One credit card and that at least one of the Defendants issued it to him, and that the quoted sections above are contained in the credit card's customer agreement issued with the card). Plaintiff proposes the following discovery and motions deadlines:

Close of Fact Discovery	March 1, 2008
Last Day For Hearing on Dispositive Motions	May 1, 2008
Expert Reports	June 2, 2008
Rebuttal Expert Reports	July 2, 2008
Close of Expert Discovery	August 2, 2008
Final Pre-Trial Conference	August 15, 2008
Trial	September 3, 2008

B. Defendants' Proposal:

Discovery should be stayed until the Court resolves Defendants' motion to dismiss for lack of subject matter jurisdiction. Alternatively, discovery should be bifurcated into (1) discovery regarding class certification and individual merits, and (2) discovery regarding the merits of the claim made by a class, if certified.

Defendants propose the following discovery and motions deadlines:

Close of Fact Discovery	November 26, 2008
Last Day For Hearing on Dispositive Motions	January 8, 2009
Expert Reports	January 9, 2009
Rebuttal Expert Reports	February 13, 2009
Close of Expert Discovery	March 27, 2009
Final Pre-Trial Conference	April 27, 2009
Trial	May 18, 2009

XVIII. TRIAL:**A. Plaintiff's Statement:**

Plaintiff anticipates that he can be ready for trial by September 2008. The estimated time for trial is 2-4 days with or without class.

B. Defendants' Statement:

The defendants anticipate that the action can be ready for trial by May 2009.

Estimated length of trial if a class is certified: 5-10 days.

Estimated length of trial if no class is certified: 2 days.

XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS:**A. Plaintiff's Disclosure:**

None exist.

B. Defendants' Disclosure:

Defendants previously filed a Certification of Interested Entities or Persons, which stated: "the undersigned certifies that the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding: Capital One Financial Corporation, which is the parent corporation to both Defendants Capital One Bank and Capital One Services, Inc."

Dated: December 3, 2007

/s/ Matthew S. Hale

Matthew S. Hale

Attorney for Plaintiff DAVID J. LEE

Dated: December 3, 2007

MORRISON & FOERSTER LLP

By: _____
/s/ Melissa A. Jones

Melissa A. Jones

Attorneys for Defendants
CAPITAL ONE BANK and
CAPITAL ONE SERVICES, INC.